

ARIZONA DEPARTMENT OF EDUCATION

Stephen H. Leshner, Due Process Hearing Officer
5151 E. Broadway Tucson, Arizona 85711
(520) 747-7790 fax (520) 747-7370

In the Matter of

--- ----,

Petitioner

IMPARTIAL DUE PROCESS
HEARING DECISION AND ORDER

v.

Hearing date: March 26, 2002

CHANDLER UNIFIED SCHOOL
DISTRICT,

Held at: 1525 W. Frye Road
Chandler, Arizona

Respondent

Parents:

--- ----

Counsel for Parents: (not represented by counsel)

Counsel for District: Denise Lowell-Britt

Udall, Shumway, Blackhurst, Allen & Lyon, P.C.
30 West First Street
Mesa, Arizona 85201

In order to preserve the privacy of the parties the text of this Decision does not include the name of any person or institution. The attached Index of Names identifies them and will be detached before release of this Decision as a public record.

DECISION

The Pre-Hearing Order in this matter set forth two issues, only one of which was addressed at the due-process hearing.

The first issue involved the propriety of disciplinary action taken by the District. On January 28, 2002, the District moved to dismiss the issue on the grounds that it involved a single suspension of less than ten days. The Parents failed to file a timely Response, and after considering the motion the Hearing Officer granted it. The Parents then presented their response in the form of a motion for reconsideration. The Hearing Officer ruled that he had jurisdiction to consider such a motion but reaffirmed, on the merits, his earlier grant of dismissal.

At the due-process hearing the parties were allowed to present further argument on the issue; after hearing their positions the hearing officer again reaffirmed the dismissal.

The remaining issue is “Whether the District failed properly to implement the former IEP and whether that IEP should be reinstated.”

The Hearing Officer granted the District’s motions *in limine* to exclude evidence or allegations of discrimination and to exclude certain witnesses exhibits that the Parents had not timely disclosed.

The impartial due process hearing began on March 26, 2002 and was completed on April 5, 2002. Upon motion of the parties, the 45-day deadline was extended to April 12, 2002.

FINDINGS OF FACT

1. Background

1. The student is a twelve-year-old boy who attends sixth grade at a District elementary school; his I.Q. of 84 and the learning disabilities discussed below may or may not be the result of head injuries suffered as an infant (the examining doctor is unsure) but in any event he is an outgoing, sociable boy who makes friends easily.

2. The student's mother has worked actively to ensure the student's educational progress; her husband is sincerely concerned with the student's welfare but as a practical matter it is she who has dealt with the District regarding the matters at issue and so for purposes of convenience only the student's mother is referred to below.

3. Although the student's previous school district had found him eligible for special education since at least the third grade, and although he had repeated the third grade, the District's own first evaluation of the student — in November, 1999, during fourth grade — concluded that he was not eligible because there was no longer a severe discrepancy between ability and his academic performance.

4. From November 1999 until March 2001 the student did not receive special education.

5. Because she thought his performance during that period unsatisfactory, the student's mother arranged for an examination by a private psychologist, which was performed in October 2000.

1 6. He concluded that the student met eligibility requirements for
2 specific learning disorders in the areas of reading and written expression.

3 7. For reasons of her own, the student's mother did not present the
4 private psychologist's report to the District until approximately March of
5 2001, during the student's fifth-grade year.

6 8. The two IEPs at issue here were written on March 8, 2001 (the
7 "former IEP" referred to in the statement of the issue, *supra*) and on February
8 2, 2002 (which is the current IEP); the March 2001 IEP was the subject of a
9 number of real or purported revisions.

10 **2. The March 2001 IEP and Addenda**

11 **a. March 2001**

12 9. In light of the private psychologist's report the District determined
13 that the student was eligible for special education and related services.

14 10. The District's first IEP for the student was prepared on March 8,
15 2001.

16 11. The private psychologist's report was considered in preparing the
17 IEP.

18 12. In essence the IEP called for education in regular-education
19 classrooms with certain instructional modifications and accommodations, for
20 some instruction in a resource room, and for occupational therapy.

21 13. The modifications and accommodations included "extra assistance
22 from teacher or others," "highlighted copies of texts/ worksheets/
23 assignments," "assignment sheets/organizers," "break assignment into small
24 assignments," "assignment sheets/organizers," "break assignment into small
25 assignments," "assignment sheets/organizers," "break assignment into small
26 assignments," "assignment sheets/organizers," "break assignment into small

1 parts/segments,” “reduced paper/pencil tasks,” “provide more time to
2 complete assignments,” and “predictable structure and classroom routine.”

3 14. The IEP team noted problems with the student’s behavior; it did not
4 include behavioral goals in the IEP, however, because the behavior problems
5 primarily occurred outside the classroom.

6 15. Although the private psychologist had recommended “copious
7 amounts of encouragement and positive feed back,” this was not specifically
8 included in the IEP.

9 16. There is no allegation that during the remainder of fifth grade the
10 District failed to implement the IEP nor to provide a free, appropriate, public
11 education (“FAPE”).

12 17. The student’s mother contends that the District violated the IEP in
13 sixth grade by failing to provide her regularly with a copy of the student’s
14 agenda, i.e., a list of activities or assignments posted in each classroom that
15 students are expected to copy; because the student’s attempts to do so were
16 often incomplete or illegible the mother feels that the school should have
17 provided her with legible copies in order to assist her in helping the student
18 with his schoolwork.

19 20
21 18. The March 2001 IEP did not specifically set forth such a
22 requirement. The mother’s position is based upon a statement in the private
23 psychologist’s report that “written homework agenda items should probably
24 be written for [the student] rather than requiring him to struggle to complete
25 them.”
26

19. Both parties, however, felt it educationally appropriate that the student be expected to attempt to copy the agenda; the private psychologist's suggestion that he not do so fails to support the contention that he should have done so and that the school should have prepared a separate copy for the mother.

20. The evidence establishes clearly that during sixth grade the District complied with the IEP requirements to highlight assignments, break them into small parts, reduce pencil and paper tasks, provide extra time for assignments, and provide predictable structure and routine.

b. August 2001

21. On August 16, 2001, about two weeks after the beginning of the sixth-grade year, the IEP team met again; this meeting had been planned in March in order to review the student's situation in view of the additional challenges that he would face in sixth grade, e.g., more difficult academics and having for the first time to move among different teachers and classrooms for different subjects.

22. Since the resumption of special education in March 2001, the student had continued to display impulsive, aggressive, and disruptive behavior, which was increasingly evident in class rather than merely on the playground; frequently unfocused and off-task, talking to classmates or walking around the room, he requiring much redirection.

23. At the August 16 meeting, which focused on these behavioral problems, written behavioral goals and objectives were established. Although

1 the student's mother was apparently not present at the meeting, she does not
2 present a challenge to the validity or necessity of the goals and objectives.

3 24. On August 17, 2001 a behavioral plan was established for the
4 student. Again, although the evidence does not clearly establish that the
5 student's mother was present, she questions the way in which the plan was
6 implemented rather than its validity.

7 25. The behavioral plan provided that in cases of "verbal aggression" or
8 "failure to comply" school personnel could request the intervention of an
9 administrator or counselor; hold a behavior conference with a teacher,
10 administrator, counselor, or parent; or reconvene an IEP meeting.

11 26. The student's mother appears to contend that the plan was not
12 properly implemented because the District did not, for example, hold a
13 behavioral conference involving a teacher *and* administrator *and* counselor
14 *and* parent, and/or reconvene an IEP meeting, every time the student was
15 given some sort of reprimand; as a factual matter, however, there is no
16 evidence that the District was not free to base its response flexibly on
17 circumstance rather than using *all* available options *each* time.

18
19
20 **c. November 2001**

21 27. The behavior plan of August 17 had also called for a "complete
22 functional behavioral assessment."

23 28. The assessment consisted of collecting data from the student's
24 teachers about his patterns of behavior.

25 29. On November 7, 2001 a meeting was held to review the data; the
26

1 student's mother was not present.

2 30. By this time the student's behavior — especially in class — had
3 worsened significantly, to the point of interfering with his academic
4 achievement; he had become upset and frustrated by his inability to keep up
5 with the work expected of him despite the accommodations and modifications
6 and also by his teacher's attempts to control and refocus his behavior.

7 31. At this meeting a "Function Behavioral Assessment Worksheet" was
8 prepared; the document is in purpose and effect a behavior plan and states
9 that its date of implementation was November 7.

10 32. On November 9, 2001 a meeting was held at which an IEP
11 Addendum was adopted, essentially restating and elaborating upon the
12 decisions made at the meeting of November 7.

13 33. Although the student's mother is shown as a participant at the
14 November 9 meeting, she did not attend it; she signed these IEP documents
15 about three days later after a District representative discussed them with her.

16 34. The behavioral plan and IEP addendum provided that the student
17 spend a portion of his lunch hour mentoring children in a first-grade class
18 rather than playing on the playground; the purpose was to reduce the amount
19 of his unstructured time (when his behavior was the most troublesome) and
20 to enhance his confidence and self-esteem.

21 35. The plan also provided for support in the form of praise, positive
22 notes home, and additional privileges (which the student's mother interprets
23 broadly, in light of a statement in the private psychologist's report that the
24
25
26

1 student “needs copious amounts of encouragement and positive feedback”)

2 36. This at first had the desired effects and the student enjoyed it but
3 he then came to miss playing on the playground, which he particularly enjoys,
4 and school personnel frequently had to remind and prompt him to go to the
5 mentoring class rather than to the playground.

6 37. The student came to see these reminders as criticism and the
7 mentoring class as a form of punishment.

8 38. The student’s mother does not challenge the procedural validity of
9 placement in the mentoring class and she agrees that it was a sound idea; she
10 appears to allege that it violated the IEP at the point when the student began
11 to regard it as punishment (i.e., it was no longer “praise,” “encouragement,” or
12 “positive feedback”).
13

14 39. The mentoring class having been accepted as a proper part of the
15 IEP, however, it did not violate the IEP.

16 40. In January 2002 the student’s mother complained about the
17 mentoring class and it was discontinued.

18 **d. December 2001**

19 41. On December 13, 2001 a meeting of the full IEP team was held to
20 discuss continued academic and behavior problems.

21 42. The team decided, in relevant part, that the student’s spelling words
22 would be copied for him (i.e., that he would be provided a written list of the
23 words he was expected to learn to spell that week) and that, whenever
24 appropriate, textbooks will be sent home for reference by the student and his
25
26

1 parents.

2 43. The student's mother alleges that this was not implemented
3 because textbooks were not sent home to her, though she does not clearly
4 identify which ones and admits that she did not check the student's book bag;
5 the teachers testify that appropriate books were sent home or made available
6 for the student to take home.

7 44. The preponderance of the evidence is that the District adequately
8 complied with the requirement of sending home books.

9 45. The student's mother apparently alleges that the student's spelling
10 words should have been copied for him before December 13; before then,
11 however, the IEP did not require this.

12 **e. January 2002**

13 46. On January 22, 2002 an IEP team meeting was held, intended as
14 an accelerated annual review of the March 2001 IEP; although she did not
15 sign as a participant, the student's mother was present and the meeting
16 consisted largely of the presentation of her concerns.

17 47. The team decided to obtain further evaluation of the student's
18 present levels of performance before preparing a new IEP.

19 48. The team also decided, effective immediately, that the student
20 would be removed from regular-education math and science classes and
21 would receive instruction in those subjects from his special-education teacher
22 in the resource room; this resulted in his spending 4-4½ hours of each 6½-
23 hour school day in the resource room.
24
25
26

1 49. This was done primarily to please the student's mother, who
2 complained that the math and science teachers had failed to implement the
3 IEP and had unfairly and excessively criticized and punished the student, who
4 had developed some personal animosity toward them, and who preferred that
5 the special-education teacher — whom she liked and whose teaching ability
6 she respected — be her son's teacher.

7 50. The math and science teacher are the only classroom teachers
8 whom the student's mother alleges failed to implement the IEP properly.
9

10 **i. The math teacher**

11 51. Following the December, 2001 meeting the math teacher purchased
12 a workbook for the student's use during class; the workbook was written for
13 fourth-grade students but the math teacher tore off the portion of its cover
14 that so indicated.

15 52. He purchased the book shortly after December 13, prompted by the
16 student's increasing behavioral difficulties, the fact that the student had
17 begun to fall behind the other students in the class, and the December 13
18 decision to make textbooks available (the math teacher generally did not use a
19 textbook).
20

21 53. His intent was to provide the student with something of educational
22 value to use at times when the student was not willing or able to pay attention
23 and remain on-task.

24 54. Although the student admits that using the workbook was optional,
25 he came to see it as his principal activity in math class.
26

1 55. The mother alleges that use of the workbook isolated the student
2 from the rest of the class and relegated him to teaching himself something
3 other than the sixth-grade curriculum — with accommodations and
4 modification — required by the IEP.

5 56. The evidence does not support the charge of isolation since the
6 student was not the only one in class using a workbook intended for a lower
7 grade level and since the student's own perception was that its use was
8 optional.

9 57. On the other hand, the evidence does not support the District's
10 contentions that the materials in the workbook were essentially equivalent to
11 those in the sixth-grade curriculum nor that the student was following the
12 math teacher's oral presentation of sixth-grade materials while
13 simultaneously working in the workbook.
14

15 58. Therefore, at least at the point when using the workbook became
16 the student's principal class activity (a time that the record does not precisely
17 identify), he was no longer receiving the curriculum required by the IEP.

18 59. The student was removed from the math teacher's class on January
19 22 (see below), by which time the workbook had been available for his use for
20 12½ days.
21

22 60. The mother also alleges that the math teacher improperly
23 reprimanded the student; at least to the extent that this is alleged to be a
24 violation of the IEP, it is not supported by the evidence.
25
26

ii. The science teacher

61. At the beginning of sixth grade the student liked his science teacher but stopped liking her after an incident, which is not at issue and which need not be detailed here, in which she disciplined him in a way he and his mother felt to be unfair.

62. The science teacher's classroom consists of tables at which the 24 members of the class sit in groups of 4 to 6; she also has two single-student desks next to her own for "classroom management" purposes — i.e., for use in keeping order and discipline.

63. On at least one occasion, when the student admits he had left his seat two or three times, the science teacher required him to sit in one of the individual seats; this happened about fifteen minutes before the end of class.

64. The science teacher similarly treats misbehavior by all members of the class.

65. Insofar as it concerns the IEP, the mother's apparent contention is that placing the student in an individual seat violates the preferences stated in the original March 2001 IEP for having the student work in small-group settings and having the help of others (arguably including students); nothing in the IEP, however, prohibits classroom teachers from applying, at least for limited periods of time, standard classroom-management techniques.

3. The February 2002 IEP

66. On January 29, an evaluation of the student's present levels of performance having been prepared since the January 22 meeting, the

1 multidisciplinary evaluation team determined that he was eligible for special
2 education and related services because of specific learning disabilities in the
3 areas of written expression, basic reading skills, reading comprehension, and
4 math calculation.

5 67. On Feb. 1, 2002, a proper IEP team prepared a new IEP.

6 68. In pertinent part this, the current, IEP continues the schedule by
7 which the student spends approximately 4-4½ in the resource room,
8 including math and science class — the rest are in regular education — and
9 provides for an aide who assists the student in each class and on the
10 playground.
11

12 68. The mother declined to have a behavioral plan included in the
13 February 2002 IEP because she wished to pursue certain disciplinary issues
14 with school administrators before doing so and because of the improvements
15 that followed the January 22 schedule change (see Finding 72).
16

17 **4. Additional Findings**

18 69. In the first quarter of sixth grade the student's grades were in the B
19 to C-minus range and the behavior scores on his report card were
20 satisfactory; his second-quarter grades dropped in all courses except one and
21 his behavior scores in most classes dropped to "unsatisfactory."

22 70. The deterioration of the student's academics and behavior — as
23 evidenced both by his report cards and by the testimony — during the latter
24 part of 2001, despite attempts to address the behavioral component in the
25 general-education setting, demonstrate that the IEP was by that time no
26 longer providing significant educational benefit.

1 71. From a strictly academic standpoint — that is, ignoring the
2 behavioral component — the student can, with appropriate modifications and
3 accommodations — function in a regular-education setting.

4 72. The student's behavior problems, and therefore his academic
5 results, have significantly improved since the schedule change on January 22.

6 73. Because of the additional monitoring provided, since use of the aide
7 has begun the student has not — for the first time in several years — had
8 significant behavior problems on the playground.

9 74. The District adequately implemented the March 2001 IEP —
10 including the modifications or additions of August, November, and December
11 2001 and January 2002 — with the exception of the use of the workbook in
12 math class.

13 75. No facts at issue here would require or permit the reinstatement of
14 that IEP.

15 76. The student's mother is generally content with the present IEP; she
16 feels that the resource room is currently the best learning environment for
17 the student but recognizes that in future years greater participation in
18 regular-education classrooms will be appropriate.

19 77. There student's sixth-grade year will end in approximately eight
20 weeks.

21 78. The District, pursuant to its normal practice, intends soon to hold
22 — and would perhaps have already held, but for the interruption of this due
23 process proceeding — an IEP team meeting to prepare a transition IEP to plan
24
25
26

for the student's entry next year into Junior High School.

CONCLUSIONS OF LAW

1. No procedural anomaly suggested by the evidence is before the hearing officer as an issue.

2. The adequacy or appropriateness of individual provisions of either IEP is not at issue; the questions presented are whether the first was implemented and whether it should be reinstated. To the extent that the hearing officer might nevertheless have the authority to cut-and-paste a solution, he declines to do so inasmuch as it is not required in order to provide a FAPE.

The March 2001 IEP and Addenda

3. Although the student's mother contends that the IEP should have contained each of the suggestions and recommendations set forth in the private psychologist's report, it need not do so. While giving such reports proper consideration, an IEP team approaches the matter from an educational, not a medical or psychological, standpoint and must prepare a plan based on its members' assessments of the student's educational needs and the resources available in the district to fill those needs.

4. Use of the workbook in math class did not deprive the student of a FAPE. It lasted, at most, 12½ days and was the result, not the cause, of the student's increasing academic and behavioral problems. There is no indication that this short, partial deviation from the IEP has had any significant impact on the student's math education nor that supplemental

1 education (even were it a requested form of relief) is necessary or appropriate.

2 5. Requiring the student to sit in an individual seat in the science class
3 neither violated the IEP nor deprived the student of a FAPE. The IEP did not
4 require that the teacher keep the student at a group table no matter how
5 disruptive or unruly he might become and did not prevent her from keeping
6 order in her classroom in the normal way. An important theme of special
7 education law is that whenever possible students should be treated *the same*
8 as regular-education students, not differently.

9 6. Placement in the mentoring class was not a deprivation of FAPE.
10 That mentoring came into conflict with the behavior plan's other goal of
11 emphasizing praise to the student does not mean that the IEP somehow
12 violated itself. Mentoring was, at most, a failed experiment that both parties
13 thought worth a try, and which was properly abandoned when its drawbacks
14 were made evident.
15

16 7. The March 200 IEP and its addenda provided a FAPE.

17 **The February 2002 IEP**

18 9. The significant question raised by the February 2002 IEP (and
19 originally by the January 22 modification of the March 2001 IEP) is whether it
20 satisfies the least-restrictive-environment requirement inasmuch as the
21 student — who was earlier not even deemed eligible for special education and
22 who can and does (with accommodations and modifications) function in
23 regular-education classes — now spends about 75% of his time in a resource
24 room.
25
26

10. Children with disabilities must be education with non-disabled children “to the maximum extent appropriate,” 34 CFR 300.550(b)(1). The relevant criteria are (a) what the district has done to accommodate the student in a regular classroom, (b) whether the student will receive an educational benefit from regular education compared with the benefits of a special education class, (c) the student’s overall educational experience in regular education, (d) the effect the student’s presence has on the regular classroom, and (e) the cost of education in a regular classroom. *Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994). The facts relevant to these factors are:

a.. The District placed the student primarily in regular-education classrooms to begin with, was diligent to a fault (viz., the math workbook) in attempting to keep him there, and continues to provide a regular-education setting for classes in which the student has not encountered particular difficulty.

b. The earlier placement had ceased to provide significant educational benefit, the student had become upset and frustrated by his experiences, and the increased resource-room time resulted in improved academic scores and greatly improved behavior.

c. The student’s overall education experience in regular education began well but had gone bad;

d. There is no significant evidence on which to apply the fourth *Sacramento City* criterion;

e. There is no allegation or evidence that the fifth is a factor here.

11. The weight of the first three criteria support a conclusion that the resource-room placement is the least restrictive appropriate environment.

12. The February 2002 IEP is appropriate and provides a FAPE.

Remedies

13. Although there has been no deprivation of FAPE, in order to clarify the parents' understanding — and perhaps, with luck, to minimize future controversies — the hearing officer will address the remedies proposed by the parents.

14. The student's mother has suggested that the March 2001 IEP be reinstated. There is no legal or factual basis for setting aside the February 2002 IEP, which is both procedurally valid and substantively proper. Even were there a basis for choosing between the two, the February 2002 IEP should remain in place: it has worked, it avoids the student's and mother's personal conflicts with the math and science teachers (which were certainly not improved by the due process hearing and which cannot be remedied by the hearing officer, who has no authority to tell the District which particular math or science teacher to assign the student to), and retaining it will provide the predictable structure and class routine needed by the student for his eight remaining weeks of class. The transitional IEP to be drafted by the parties will address the student's needs thereafter.

15. The student's mother requests that the hearing officer order the student's transfer to a private school; a hearing officer has no legal authority to make such an order.

16. She further requests that the hearing officer order the destruction or removal of certain of the student's school records, the accuracy of which

1 she questions; again, at least under these facts, a hearing officer has no legal
2 authority to do so.

3
4 **ORDER**

5 For the foregoing reasons, the hearing officer rules in favor of the
6 District.

7 Dated this twelfth day of April, 2002

8
9
10
11 _____
12 Stephen H. Leshner
13 Due Process Hearing Officer

14 **APPEAL PROCESS**

15 The decision of the Impartial Due Process Hearing Officer may be appealed by
16 submitting a written request for an appeal with the Exceptional Student
17 Services Division of the Arizona Department of Education (ADC/ESS).The
18 ADE/ESS shall forward the request to the Arizona Office of Administrative
19 Hearings, which shall conduct an Administrative Review of the Impartial Due
20 Process Hearing. The request for an appeal shall be accepted only if the
21 request is initiated within 35 calendar days after the decision of the Impartial
22 Due Process Hearing Officer has been received by the parties. Written
23 requests for an appeal must be sent to the Dispute Resolution Coordinator,
24 Arizona Department of Education, Exceptional Student Services, 1535 West
25 Jefferson, Phoenix, Arizona 85007.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

INDEX OF NAMES

Student	---	----
Father	---	----
Mother	---	----
Resource Teacher	---	----
Science Teacher	---	----
Math Teacher	---	----
Private Psychologist	---	----
School	---	----
District	Chandler Unified School District	